STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.)

ROBERT and PATRICIA STOKES,

Plaintiffs/Appellants/
Cross-Appellees

-vs-

MILLEN ROOFING COMPANY,

Defendant/Appellee
Cross-Appellant.

Supreme Court Docket No. 119074

Court of Appeals No. 216334

Lower Court Case No. 94-3123-NZ
Hon. Donald A. Johnston, III

BRIEF ON APPEAL - APPELLEE

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STATEMENT OF BASIS FOR JURISDICTION

Appellee concurs with Appellant that this Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2) since this Court previously has granted Plaintiff's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTION INVOLVED

1. DID THE COURT OF APPEAL DECISION AFFIRMING THE TRIAL COURT'S AWARD OF EQUITABLE RELIEF TO DEFENDANT CONTRAVENE MCL 339.2412 AND THE ESTABLISHED PRINCIPLES OF EQUITY?

The Court of Appeals answered "No."

Defendant/Appellee/Cross-Appellant answers "Yes."

Plaintiff/Appellant/Cross-Appellee answers "No."

Appellee has restated Appellant's question since Appellants' form of the question presumes that the Trial Court's award contravenes the principles of equity and MCL 339.2412. That is actually the question before this Court.

COUNTER-STATEMENT OF FACTS

The Appellant ("Millen Roofing") disagrees with a number of facts advanced by the Appellants ("the Stokes"). Fortunately, most of those facts are not relevant to this appeal since the appeal is one primarily of statutory interpretation. However, some facts are important to this Court's understanding of the Trial Court's application of equity.

The Stokes claim that Millen Roofing violated the contractual obligation to "match the existing roof" and instead laid the slate to create a "striping effect." This esthetic dispute arose very early in the contract. Testimony established that Millen Roofing did, in fact, "match the existing roof" which was just adjacent to the property (Cross-Appellant's Supplemental Appendix Pages 85-86). Patty Stokes, however, decided she wanted the slate pattern to match the roof on the opposing side of the roof crown (Cross-Appellant's Supplemental Appendix Page 87). This, of course, created significant difficulties because it added considerable expense, which the parties could not resolve. Because of these early difficulties, Millen Roofing pulled off the job until it could be assured that it would not be required to do similar additional work without either getting paid for it or having a resolution process.[1]

The Trial Court agreed there were extras which the Court did not consider in its computations because they were not followed up with a written Change Order which the Stokes obtained the benefit of the extras (Cross-Appellant's Appendix 181B and 182B).

[1] These additional charges are not relevant to the dispute as presently postured. Said compensation issues would be relevant if Millen Roofing is allowed to pursue its compensation claims upon remand to the Trial Court.

While Stokes describe these differences as a breach of contract, the Trial Court "politely characterized [them] as artistic differences." (Cross Appellant's Appendix Page 168b.)[2]

The Stokes' Statement of Facts fails to inform this Court also that at all times relevant to the dispute involved, there were both a licensed builder and a licensed contractor in charge of the project. Summit Construction was not only a licensed builder on the project, but Summit Construction had taken out a permit for the house addition which permit included the roofing subcontractor. Design Plus was a licensed architect on the job. In addition, the Stokes hired a second licensed architect, Thomas Dowling, to review all the work. The Stokes also employed the services of a roofing expert from Ohio, Mr. Schuler.[3]

The Stokes' Statement of Facts fails to even discuss the most critical evidence -- evidence which was fundamental to the Trial Court's Decision. Prior to their relationship with Millen Roofing, the Stokes had previously taken advantage of at least one prior contractor -- using the same "lack of license" argument. Prior to hiring Summit Construction, the Stokes had engaged the services of Sumner Construction as their general contractor. Unfortunately, shortly before contracting with the Stokes, Doug Sumner had incorporated his construction business. He signed his construction contract with the Stokes under the corporate name. Unfortunately, his attorney failed to advise him that he needed to change his license from his individual name to his

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[2] The Trial Court did not resolve this issue. Rather, the Trial Court found "...there were a number of changes with regard to the roof and much work was done other than what was specified in the written contract." As to the relaying of the slate, the Court stated "and there was a great deal of dispute as to whether this was necessary to conform the roof to the pre-existing roof in the older portion of the home or whether it was simply an artistic change insisted upon by Mrs. Stokes." (Cross-Appellant's Appendix Page 169b.)

[3] It would be tough to identify another construction project which had as much supervision by licensed and expert parties as did this project.

corporate name. When the Stokes had a falling out with Sumner, he filed a Construction Lien. The Stokes successfully obtained Summary Disposition claiming that Sumner Construction, in its corporate form, was unlicensed. When Mr. Sumner attempted to sue in his individual name, the Stokes obtained successful Summary Disposition by claiming that they did not have a contract with the licensed individual. The Trial Court noted that fact:

> "First of all, although it certainly is true that Mrs. Stokes is a housewife who has taken on the role of serving in the stead of a general contractor for much of this massive renovation project, she has picked up some considerable contact with the legal system along the way. Notably, she was in this very court on September 3, 1993, in the Sumner Construction case, which is another piece of litigation related to this project, and, at that time and in that hearing, prevailed on an unlicensed contractor issue. That is to say, the Court granted summary disposition in her favor on an issue in the Sumner case, based on the fact that the contractor in question was not licensed in that case, either."
>
> Cross-Appellant's Appendix Page 175b.

The Stokes' recitation of facts is also devoid of any reference to the fact that Mrs. Stokes acted as a general contractor.[4] The real property was owned by the Stokes collectively, as tenancy by entireties. However, Mrs. Stokes, individually, began acting as a general contractor -- undertaking massive portions of the contract directly. The Trial Court made a number of conclusions in its Opinion regarding her conduct:

1. ... "she appears to have managed much of this herself." (Cross-Appellant's Appendix Page 166b);
2. "First of all, although it certainly is true that Mrs. Stokes is a housewife who has taken on the role of serving in the stead of a general contractor

[4] If Mrs. Stokes was a general contractor, then her project is exempt from the Licensing Act and the licensing requirement does apply to Millen Roofing. MCL 339.2403(b).

for much of this massive renovation project, she has picked up some considerable contact with the legal system along the way." (Cross-Appellant's Appendix Page 175b);

3. "I am satisfied that undoubtedly at some point she indicated to Mr. Millen that she was functioning in the role of or as if she were the contractor." (Cross Appellant's Appendix page 181b.)

The Trial Court's Opinion was well founded on the evidence presented at trial.

1. Mrs. Stokes eventually took out a building permit listing herself as contractor (Cross-Appellant's Appendix Pages 247b – 249b).
2. She signed statements under oath indicating that she was the contractor (Cross-Appellant's Appendix Pages 252b, 254b, 255b).
3. She prepared computer spreadsheets in which she listed the people (including Millen Roofing) as her **subcontractors**. (Cross Appellant's Appendix Page 253b).

Finally, Stokes' brief is devoid of reference to the fact that Patti Stokes solicited Millen Roofing and represented that it would not need a license or permits. In this way, she enticed Millen Roofing to begin immediately. (Cross Appellant's Supplemental Index, Pages 257b, 263b, 265b-267b, and 269b.)

STANDARD OF REVIEW

Appellee agrees that the issue of whether the Trial Court has the authority to grant equitable relief is reviewed de novo. Appellee also agrees that a Trial Court's Findings of Fact in Support of an Award of Equitable Relief are reviewed for clear error.

ARGUMENT

THE TRIAL COURT'S AWARD OF EQUITABLE RELIEF ON MILLEN ROOFING'S AMENDED COUNTER-COMPLAINT DID NOT CONTRAVENE MCL 339.2412 AND THE ESTABLISHED PRINCIPLES OF EQUITY.

A. MCL 339.2412 DOES NOT PROHIBIT THE RELIEF PROVIDED BY THE TRIAL COURT.

1. Millen Roofing was not required to be licensed under a strict, but clear reading of the statute.

The trial court dismissed most of Millen's Complaint, believing it was compelled to do so under Section 2412 of the Residential Builders Act ("RBA"). MCL 339.2412.

Section 2412 of the Residential Builders Act provides:

> "A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract." (Emphasis added)
>
> MCL 339.2412.

The RBA is found at MCL 339.2401 through 2412. The Court of Appeals likewise erroneously stated:

> ". . . Because Defendant was unlicensed at the time it performed the work on plaintiffs' roof, Defendant had no right to pursue a claim against plaintiffs." (Court of Appeals Opinion, pg. 3.)

Such a conclusion is not warranted by a fair reading of the statute for at least two reasons:

1. Millen Roofing did not need to be licensed under Article 24; and

2. The Trial Court's Award was not collection of compensation.

Interpretation of the Statute

Where the language of a statute is clear and unambiguous, the courts must apply the statute as written. Turner v Auto Club Ins Ass'n, 448 Mich 22 528 NW2d 681 (1995). Judicial construction is not needed or even allowed. *Id.*

While recognizing that the Residential Builders Act is a "penal" statute, the Court of Appeals failed to utilize rules of construction associated with penal statutes. A penalty clause is to be "strictly construed in favor of the person being penalized." Washburn v Michailoff, 240 Mich App 669, 677, 613 NW2d 405 (2000); Ellison v Detroit, 196 Mich App 722, 723, 493 NW2d 523 (1992).

A second interpretory reason that the RBA must be strictly construed is that it is in derogation of the common law. At common law, parties could contract and enforce contracts without being licensed. Statutes which abrogate common law or are a derogation of common law must be narrowly and strictly construed. People v Powell, 280 Mich 699, 274 NW 372 (1937); B & B Inv Group v Gitler, 229 Mich App 1, 581 NW2d 17 (1998); Smith v YMCA of Benton Harbor/St. Joseph, 216 Mich App 552, 550 NW2d 262 (1996), app denied 454 Mich 863, 558 NW2d 733; Lincoln v Gupta, 142 Mich App, 615, 370 NW2d 312 (1985); McKinnunen v Bohlinger, 128 Mich App 635, 341 NW2d 167 (1983).

1. The statute, read literally, does not limit suit by an unlicensed builder.

Had the Court of Appeals taken a look at the clear language of the statute and applied normal rules of construction to that language, this panel of the Court of Appeals would not have had to address the Republic Bank decision.

Although the Court of Appeals reached the right conclusion because of the binding effect of Republic Bank, *supra*, the conclusion was correct even without relying on the Republic Bank decision. The Stokes' Court of Appeals stated:

> "This Court is also concerned with the apparent lack of deference to our Legislature demonstrated by the *Republic Bank* decision. The penalty contained in MCL 339.2412; MSA 18.425(2412) was enacted more than forty years ago and the language of the statute has not changed significantly during that time. *See Alexander v Neal,* 364 Mich 485, 486-487; NW2d (1961). Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted legislative decree. Where the meaning of the language of a statue is clear, this Court should refrain from adding judicial gloss. *Thrifty Rent-A-Car Systems, Inc. v Dep't of Transportation,* 236 Mich App 674, 678; 601 NW2d 420 (1999). Further, this Court should not depart from the literal construction of a statute unless application of the statute as written is inconsistent with the purpose of the legislation. *Id.* Although the holding of *Republic Bank* did not involve direct interpretation of a statute, this Court's extension of the equitable exception of *Kirkendall* to all situations where a property owner attempts to remove an invalid construction lien from the property's title had the same result as inappropriate judicial interpretation in that it subverted the clear intent of the Legislature." (Court of Appeals Opinion, Page 7).

The language of the statute is clear: it specifically uses the term "article." Article 24 does not require a license. The incapacitating language is found in Article 24. A review of Article 24 discloses there is no section where a "license was required by this article." The Court of Appeals' opinion does not address this requirement, but refers to another article. In its discussion on the application of equity, the Court of Appeals made the statement:

> "In both Republic Bank and the present case, the defendant residential contractors had unclean hands. Both defendants violated the law by engaging in the practice of residential construction or improvement without a license. MCL 339.601(1); MSA 18.425(601)(1)" (Opinion, pg. 5). (emphasis added).

What the Court of Appeals failed to acknowledge is that the cited section is under Article 6, not Article 24. The penalty the Court of Appeals references is under Article 24. However, Article 24 does not require a license.

The penalty article of the Occupational Code is Article 6. The organizational breakdown of Occupational Code is set out in Appendix Page 256.

A review of the Sections under Article 24 shows that there is no requirement for licensing in Article 24. The Legislature cannot be presumed to have meant to use the word "chapter" when it used the specific term "article." Even if the Legislature made a mistake, the rules on construction of penal statutes mandate a strict reading in favor of Millen.

2. Section 2412 bars only suits for "collection of compensation."

Second, the language of the statute only bars suits seeking the "collection of compensation." The trial court recognized this distinction. While the Court of Appeals acknowledged that the language of the statute was clear, it's Opinion omits reference to the clear language. The language is clear because it bars a builder from bringing or maintaining ". . . an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article." MCL 339.2412 (emphasis added). This statute is eminently clear. There is nothing in the language of the act which gives Michigan's residents the right to keep anything which they have not paid for. It simply says that some unlicensed builders may not

maintain an action to collect compensation for the contract. Anyone can understand that seeking the return of one's own materials back is not compensation. A dictionary definition of compensation is something above and beyond what you started out with:

> "n 1. the act of compensating. 2. the state of being compensated. 3. something given or received as an equivalent for services, debt, loss, injury, etc.; indemnity; reparation; payment. 4. Biol. The improvement of any defect by the excessive development or action of another part of the same structure. 5. a *psychological mechanism by which an individual attempts to make* up for some personal deficiency by developing or stressing another aspect of personality or ability."
>
> Random House Webster's College Dictionary, 1996

Millen Roofing paid for these materials and now wants them back. The Trial Court did not award compensation.

The Trial Court went one step further for the benefit of the Stokes. The Trial Court allowed the Stokes to retain the roof by paying money into escrow. In effect, the remedy was theirs to choose. The fact that a replacement roof would cost in excess of $200,000 might make the choice somewhat obvious. Yet the choice was the Stokes'. The Trial Court could have stopped its analysis by simply allowing Millen Roofing to reclaim its materials.

By failure to analyze the clear and unambiguous language of the statute, the Court of Appeals has assumed something which is not clearly stated in the statute. The statute prohibits only actions for "compensation." The Trial Court granted Summary Disposition as to any compensation claims but allowed non-compensation claims to go forward. Under MCL 339.2412, an unlicensed builder is not barred from bringing <u>any</u> action. Rather, the builder is barred only from maintaining <u>an</u> action . . . for the <u>collection of compensation</u> . . ." (emphasis added).

The Construction Lien Act ("CLA") gives some indication of the dichotomy between an action for compensation and other actions. Section 302 of the CLA distinguishes between a contract action and a lien action:

> "This act shall not be construed to prevent a lien claimant from maintaining a separate action on a contract."
>
> MCL 570.1302(2).

Section 2412 of the RBA clearly references the contract, which is a legal action. Assuming a license is required under Article 24, it is only an action based upon the contract which was disenfranchised. It does not prohibit the separate construction lien (an equitable action) action which the Legislature created under the CLA well after the RBA was established. The relief awarded by Judge Johnston simply gave the materials back to Millen Roofing. It did not compensate Millen Roofing for its labor. Simply put, the Trial Court was unwilling to make the state an unwitting partner in Mrs. Stokes' theft of materials. Nothing in the statute can be read to infer that the Legislature intended someone of the yoke of Mrs. Stokes to be able to use this statute as a sword to get free materials.

3. Millen Roofing was not required to be licensed as a supplier.

Under the CLA, Millen Roofing meets the definition of a supplier. While it also supplied labor, part of its relationship with Mrs. Stokes was to supply material. Even if this Court would characterize Millen as a contractor or subcontractor, it does not mean that Millen is disqualified from also qualifying as a supplier under the CLA or RBA. Kitchen Suppliers, Inc. v Erb Lumber Co., 176 Mich App 602 at 608, 440 NW2d 50 (1989).

The CLA statute provides definitions of laborer, subcontractor and supplier. MCL 570.1104 and MCL 570.1106. Millen Roofing clearly was a subcontractor of Patty Stokes.[5] Millen also satisfies the definition of "supplier." While it installed the slate on the roof, it also supplied the slate.

A supplier is not required to be licensed under the RBA. There is no requirement under the CLA that a supplier have a written contract. Even if this Court should determine that a penalty can be exacted under Article 24, the RBA is simply inapplicable to the supplier relationship of Millen's contract. As such, the Trial Court was authorized not only to grant equitable relief, but to grant a money judgment on the materials supplied by Millen Roofing. The decision of Old Kent Bank of Kalamazoo v Whitaker Const. Co., 222 Mich App 436, 566 NW2d 1 (1997), further supports the dichotomy between a lien action and a contract action.

4. The intent of the RBA has been met.

The obvious intent of Residential Builders Act is to protect Michigan's citizens from being victimized by unqualified builders. Those purposes were well met in this case, because at all times not only was there a licensed builder involved supervising the work, but one or more licensed architects. The building permit covering the roof was taken out by Summit Construction, a licensed builder. Under the building permit, Summit Construction remained responsible that the roof was installed in accordance with local building codes.

This case presents the unique factual situation where the property owner is attempting to use the Residential Builders Act as a sword and not a shield. The roof is

[5] This is an escapable conclusion whether based upon documents prepared by Patty Stokes herself or by statutory definition. The property was owned by tenancy by the entireties whereas the contract with Millen Roofing was signed

not defective.[6] Indeed, it may be one of the finest roofs in the State of Michigan. On the other hand, the Appellants created the very facts they are now arguing by "removing" the roofing contract from the remainder of this multi-million dollar project. In that fashion, they proceeded to get Summit's licensing protection, but did not have to pay a contractor's fee to Summit. But most appalling is the fact that at the time they did this, the Stokes already had pulled the same "licensing defense" on the first contractor. Now the Stokes want to pull the same trick again. Even if the language of the statute clearly prohibited an unlicensed builder from bringing an action for any relief, this Court must recognize that there are equitable exceptions such as this, when an owner must be estopped from using the statute in an effort to get free goods and services out of contractors.

The RBA's announced intention was to attack unscrupulous, fly-by-night contractors. Alexander v Neal, *supra*. A decision against Millen Roofing in this case would do nothing to advance that legislative purpose. Millen Roofing is not fly-by-night, it is not unscrupulous, and has installed probably one of the finest roofs in the state of Michigan.[7] Millen was brought in, not because it was fly-by-night or unqualified, but because it was established and well qualified. It worked under the supervision of several licensed individuals. The permit of Summit Construction covered the roof. As a consequence, a licensed contractor was responsible for the work. The local building officials, if unsatisfied with the roof, would have taken enforcement action against the licensed contractor who held the permit. The ultimate purpose of the Legislature was

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by Patty Stokes only. (See Cross-Appellant's Appendix Page 241b-244b.)

[6] In its facts, the Stokes state that some "punchlist" items needed to be done and insinuate that Millen Roofing's work was not complete. Even her attorney, Mr. Keith Walker, refutes that and establishes that the work was completed (Cross-Appellant's Supplemental Appendix Page 276b).

not to give someone a free ride but to make sure work was properly supervised. That purpose was well met.

5. Since Patricia Stokes acted as the general contractor toward Millen Roofing, Millen Roofing is exempt from licensing under the Residential Builders Act.

Millen Roofing was a subcontractor of Patty Stokes. (Appendix Page 151) Millen Roofing contracted with Patty Stokes, an individual. The owner of the real property was a "tenants by the entireties entity", comprised of Robert Stokes and Patty Stokes. On behalf of that owner, Patty Stokes held herself out to be the contractor. Numerous sworn statements (filled out pursuant to the Construction Lien Act) identify Patty Stokes as the contractor for purposes of the Construction Lien Act. (Appendix Page 252) In addition, Patty Stokes represented to Millen Roofing that she was going to be the contractor, and after the termination of Summit Construction, obtained the building permit in her own name as contractor. (Appendix Pages 247, 254, 255) In the Sumner case, she testified she was the contractor for over $700,000 in subcontracts and sought $50,000 in compensation. (Appendix Pages 157-158) She completed spreadsheets listing her subs. (See Example at Appendix Page 253.) (See also her testimony at Supplemental Appendix pages 277b – 279b.)

Patty Stokes' relationship to the project is relevant to Millen Roofing's claims. Millen asserts the Residential Builders Act requires a finding that Patricia Stokes' status was that of a contractor which provides an exemption to the Builder's Licensing Act. Therefore Millen Roofing has a right to directly seek compensation (*i.e.*, not equitable relief) from Patty Stokes.

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[7] Millen's credentials are impeccable, heading up numerous industry organizations on state and national level. (Cross-Appellant's Supplemental Appendix Page 258b.)

Michigan recognizes that "tenancy by the entireties" ownership is different than individual ownership. See Budwit v Herr, 339 Mich 265, 63 NW2d 841 (1954). That legal creation cannot neatly be ignored by the Stokes when it simply suits their purposes. *Unfortunately, the Court of Appeals did not analyze these unique facts.* Since Millen Roofing was a subcontractor of Patty Stokes, Millen Roofing was entitled to a construction lien against the property of both Stokes and a contract action against Mrs. Stokes. The Construction Lien Act recognizes that the contract action and the lien rights are separate rights. MCL 570.1302(2). See also Old Kent Bank of Kalamazoo v Whitaker Const. Co. (222 Mich App 436, 566 NW2d 1 (1997), appeal denied, 457 Mich 858, 581 NW2d 729 (1998).

The Stokes' Court of Appeals failed to recognize that an exemption is provided for the transaction (of engaging in the business of residential builder) pursuant to Section 2403 of the Residential Builders Act. MCL 339.2403(b). The Court of Appeals stated:

> The act lists several exceptions to the licensing requirement, however, there is no exception for subcontractors to unlicensed property owners within the plain language of MCL 339.2403; MSA 18.425(2403). Because the Legislature did not see fit to include an exception for defendant's situation, we will not read such an exception into the statute. The Legislature is presumed to be aware of the consequences of the use or omission of language when it enacts the laws that govern our behavior. *Lumley v Univ of Michigan Bd of Regents,* 215 Mich App 125, 129-130; 544 NW2d 692 (1996).
>
> (Opinion, pg. 8).

Millen asserts that the Court of Appeals has misread the language of Section 2403. That language states:

> Sec. 2403. Notwithstanding article 6, a person may engage in the business of or act in the capacity of a residential builder or a

> residential maintenance and alteration contractor or salesperson in this state without having a license, if the person is 1 of the following:
>
> . . .
>
> (b) An owner of property, with reference to a structure on the property for the owner's own use and occupancy.
>
> . . .
>
> MCL 339.2403(b) (emphasis added).

The interpretation of this Section is one of first impression. The Court of Appeals has read this as an exception to MCL 339.2412. However, the language of Section 2403, when read fairly, is much broader than an exception. It is an enabling statute. It removes Patty Stokes transactions from the prohibitions of Article 6 (MCL 339.601 *et seq.)* It says that an owner "may engage in the business of or act in the capacity of a residential builder . . . [notwithstanding article 6]..." MCL 339.2403. This section not only excuses Mrs. Stokes from obtaining a license but also takes Mrs. Stokes' whole "project" outside the scope of Article 6. The logical conclusion is that Millen's work on an exempted project is not subject to the licensing requirements of Article 6. Even if the penalties found in Article 24 apply to the licensing requirement of Article 6 generally, the "project" Millen worked on is not subject to Article 6. Again, the rules of interpretation dictate that this section be construed strictly in favor of Millen.

The Stokes' Court of Appeals' reading of the exemption leads to an unintentional result when fully thought out. The Court of Appeals saw only an exemption for Mrs. Stokes and none for those dealing with Mrs. Stokes (*i.e.*, individuals vs. transactions exemptions). This leads to an absurd result: Mrs. Stokes is exempted from licensing but everyone she deals with would be required to be licensed. BUT if everyone she deals with must be licensed, there is no point in having an exemption in the first place. A statute should not be construed in a manner in which a part is rendered nugatory.

Baird v Maher, 316 Mich 657 of 662, 26 NW2d 346 (1947). If possible, every part must be given effect. Klopfenstein v Rohlfing, 356 Mich 197 at 202, 96 NW2d 782 (1959). If this is what the Legislature intended, it should have enacted a statute that specifically required subcontractors of exempted unlicensed contractors to be licensed.

B. THERE ARE AND SHOULD BE EQUITABLE EXCEPTIONS TO THE RESIDENTIAL BUILDERS ACT.

The Trial Court recognized that equitable exceptions exist to the RBA. The Stokes reject any exceptions. Millen believes that the exceptions should be more extensive than even recognized by the Trial Court.

1. The Stokes sought equity by asking the Trial Court to remove Millen Roofing's construction lien against their home. Therefore, they must do equity.

The case law is clear that the party who seeks equity must be prepared to do equity. Kirkendall v Heckinger, 403 Mich 371, 269 NW2d 184 (1978); Republic Bank v Modular One, 232 Mich App 444, 591 NW2d 335 (1998); Green v Ingersoll, 89 Mich App 228, 280 NW2d 496 (1979). Of the above cases the one that is "on all fours" with this case is Republic Bank. In the Republic Bank case an unlicensed contractor, Modular One, placed a construction lien on property owned by Republic Bank. Republic Bank filed a quiet title action to remove Modular One's lien. The Republic Bank Court stated:

> "Overall, an application of the Kirkendall equity principal seems fairly straight forward. Where one party seeks an equitable remedy against an unlicensed builder who has performed residential construction work upon property, and circumstances indicate that the builder should equitably be paid for that work, the party seeking equity must also be required to do equity by compensating the builder." Republic Bank, 591 NW2d at 339.

The Republic Bank Court summarized the law and its application to that case as follows:

> "Whether the builder holds a mortgage or a lien, or simply performed work on the property for which collection cannot be made because the builder is unlicensed, the important considerations are whether the plaintiff will benefit through equity at the expense of the defendant builder and thus whether equity requires payment for the work under the particular circumstances of the case. Here, the defendant would have been able to sue to collect on the lien, but for his unlicensed status and plaintiff seeks to avoid payments for work upon the properties that it knew were still owing that the time that it purchased the properties. In our judgment, under these circumstances, where plaintiff sought to quiet title to its property at the expense of the equitable rights of defendant, as in *Kirkendall, Green & Barbour*, plaintiff is required to do equity and pay for defendant's work on the property before it can receive the equity of an unclouded title.
>
> Applying these principles, we believe that the trial court incorrectly held that the defendants' liens were unenforceable because defendant did not have a builder's license. As a precondition to resolving plaintiff's action to quiet title, the court should have determined if defendant was entitled to payment for the work he performed on the property. Because the court concluded only that defendant's liens were invalid, the court essentially allowed MCL § 339.2412; MSA 18.425(2412) to be used as a sword rather than a shield, contrary to this Court's holdings in Parker (citations omitted)." Republic Bank 591 NW2d at 340.

The Stokes would have this Court believe that they did not seek equity in this lawsuit. That position is simply untrue. The Plaintiffs cannot deny that in their initial suit they sought not only contractual damages, but also sought to have Millen Roofing's construction lien against the property removed. The Stokes cannot deny that it sought the dissolution of Millen's Roofing's construction lien and that the Trial Court's Order dated December 2, 1994, did dissolve the construction lien against the Stokes' home. Simply put, the Stokes sought equity from the Kent County Circuit Court in this case.

Consequently, they cannot deny the applicability of the Republic Bank decision to this case. The facts of the two cases are almost identical. It was Republic Bank which was correctly decided. The Republic Bank panel correctly analyzed that the Plaintiff initiated equitable action and it was then required to treat Defendant equitably.

The Stokes' panel reluctantly acknowledged the existence of the rule that one who seeks equity must do equity. (Opinion pgs. 3-5). However, thereafter, the Court of Appeals then equates being unlicensed as being the same as not having clean hands.[8] Yet that decision seems to ignore the factual situation in this case, in which the Stokes initiated the lawsuit and came to the Court asking for equitable relief. It is the Stokes, therefore, who must have clean hands prior to seeking equity from the Circuit Court. Once the Trial Court agreed to give equitable relief to the Stokes, it was obligated to give equity to Millen Roofing.

The Stokes assert, without support, that Millen Roofing's Construction Lien was unlawfully filed. The Stokes' panel of the Court of Appeals seems to have bought that argument without analysis. Section 114 of the CLA does not state that an unlicensed party cannot have a Construction Lien. The actual language of that section states:

> "Sec. 114. A contractor shall not have a right to a construction lien upon the interest of any owner or lessee in a residential structure unless the contractor has provided an improvement to the residential structure pursuant to a written contract between the owner or lessee and the contractor any amendments or additions to the contract also shall be in writing. The contract required by this section shall contain a statement, in type no smaller than that of the body of the contract, setting forth all of the following:
>
> (a) That a residential builder or a residential maintenance and alteration contractor is required to be licensed under article 24 of Act 299 of the Public Acts of 1980, as amended, being sections

[8] The Stokes ignore that no argument can be made that a license is required for the material in which Millen Roofing was a supplier.

339.2401 to 339.2412 of the Michigan Compiled Laws. That an electrician is required to be licensed under Act No. 217 of the Public Acts of 1956, as amended, being sections 338.881 to 338.892 of the Michigan Compiled Laws. That a plumber is required to be licensed under Act No. 266 of the Public Acts of 1929, as amended, being sections 338.901 to 338.917 of the Michigan Compiled Laws.

(b) If the contractor is required to be licensed to provide the contracted improvement, that the contractor is so licensed.

(c) If a license is required, the contractor's license number.

Read strictly, the following conclusions can be drawn:

1. It applies only to a "contractor": and

2. It requires a written contract.

The statute then goes on to mandate that certain language be in the contract regarding license numbers for a residential builder and certain other licensed parties. However, it does not mandate any penalty for failure to have the language in the contract provided there is a written contract. The only known prior decision of which Appellee is aware of is the case of In Re Craft, 120 BR 84 (Bankruptcy ED Mich 1989) which ruled that the failure to have demanded the language was not fatal to the Construction Lien claim when there was in fact a written contract. (See Supplemental Cross-Appellant's Appendix Pages 280-288.) Assuming that Millen is neither a supplier nor a subcontractor, Millen did have a written contract satisfying the primary mandate of this section.

The conclusion that one can still maintain a Construction Lien in spite of failing to strictly satisfy Section 114 of the CLA is supported by the language of Section 203. Section 203 is part of Part 2 of the CLA. Part 2 is triggered only for residential

construction and provides that the Homeowner Recovery Fund will pay the Construction Lien claimant when the homeowner has paid the contractor in full. Section 203 states:

> "(2) In the absence of a written contract pursuant to section 114, the filing of an affidavit under this section shall create a rebuttable presumption that the owner or lessee has paid the contractor for the improvement. The presumption may be overcome only by a showing of clear and convincing evidence to the contrary."
>
> MCL 570.1203(2), (emphasis added).

Section does not designate what the Legislature meant by "absence of a written contract pursuant to Section 114." It might have meant the absence of a written contract entirely, or it might have meant having a written contract but simply not complying with the terms of Section 114. In either event, it is clear that the failure to have absolute and total compliance with Section 114 is not fatal to a Construction Lien. If Stokes' conclusion were mandated by Section 114, there would be no necessity to have this provision under Section 203, since all such Construction Liens would be invalid for their failure to strictly comply with Section 114.

The Appellant's proposition that the Republic Bank decision and the relief afforded to Millen Roofing provide a road map to avoid the intent of the Legislature is felicitous. The lien was not invalid. The lien exists even if there is not a contract action. See Old Kent Bank, of Kalamazoo, *supra*.

The Republic Bank, *supra* and Green, *supra*, are not the only decisions which support the Trial court's grant of equity. See also Parker v McQuade Plumbing & Heating, Inc., 124 Mich App 469, 335 NW2d 7 (1983); and Barbour v Handlos Real Estate and Bldg. Corp., 152 Mich App 174, 393 NW2d 581 (1986).

The Stokes' panel of the Court of Appeals misapplied the "clean hands maxim." This maxim is to be applied to the Stokes who came to the court seeking equity:

> " 'No citation of authority is necessary to establish that one who seeks the aid of equity must come in with clean hands.' Charles E. Austin, Inc. v Secretary of State, 321 Mich. 426, 435, 32 N.W.2d 694 (1948). The clean hands maxim is an integral part of any action in equity. The U.S. Supreme court captured the essence of the maxim when it said:
>
> '(The clean hands maxim) is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Bein v Heath, 47 U.S. 228, 6 How. 228, 247, 12 L.Ed. 416.' Precision Instrument Manufacturing Co. v Automotive Maintenance Machinery Co., 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1944). (Emphasis Added).
>
> Stachnik v Winkel, 394 Mich 375 at 382.

Having sought equity of the Courts, it seems incongruous that the Stokes would now complain that the court is invested with equitable powers.

While the Trial Court should have imposed equity at the time it dissolved Millen Roofing's construction lien against the Stokes property, the fact that a Trial Court sought to do to equity during the course of that lawsuit was entirely appropriate.

Stokes make much ado over the dichotomy between legal and equitable relief. Such a dichotomy does nothing to resolve the issue since the CLA recognizes that both actions may be maintained separate of each other. MCL 507.1302(2). See also Old Kent of Kalamazoo v Whitaker Const. Co., *supra*. The CLA invokes the courts equitable jurisdiction. MCL 570.1118(1); MCL 570.1302(1). Old Kent, *supra*; Dane Const., Inc., v Royal's Wine & Deli, Inc., 192 Mich App 287, 480 NW2d 343 (1992).

Equitable actions may be maintained even if there is legal remedy. Reed v Noyce, Inc., 106 Mich App 113 at 120, 308 NW2d 445 (1981).

The biggest difficulty with Stokes' position is it ignores the fact they invoked the Court's equitable jurisdiction. As stated by the Michigan Supreme Court in Stachnik, *supra* (citing the United States Supreme Court), Millen Roofing's behavior (as the defendant) is irrelevant to whether it is entitled to equity. Once the trial court acted on Stokes' equitable request, it was obligated to do equity to Millen Roofing.

2. An equitable remedy was appropriate based on the facts of this case.

It is clear that this section of the Residential Builders Act does not bar a claim for recovery of materials used, but not paid for. The Act simply prohibits an unlicensed contractor from recovering compensation for the work performed. The Trial Court fashioned a remedy that would allow all parties to be put in the same position they occupied prior to their dealings with each other. The Trial Court held that before Millen would be allowed to repossess the materials used on the roof, it would have to repay the payments received from the Stokes. If the Stokes desired to retain the roof which was in no way defective, the Trial Court found that the equity of the case would require the Stokes to pay the amount they admitted was due.

In short, the Trial Court fashioned an equitable remedy that it believed was commensurate with the equities of the case. The decision allowed Millen to remove the roof. As an equitable act to the Stokes, the Judge then allowed them one last opportunity to pay the amount they admitted was due and keep the roof. The Trial Court was not willing to let the Stokes use the Residential Builders Act as a sword to again get something without paying for it. Trial Courts must be accorded considerable

latitude in fashioning equities commensurate with the equities of the case. Governale v Owosso, 59 Mich App 756, 229 NW2d 918 (1975).

In the Governale case, the City of Owosso trespassed onto the Plaintiffs' property and installed a waterline by mistake. The Plaintiffs sought to prohibit the City from removing the waterline based on the theory that once installed, the waterline became part and parcel of the realty. The Trial Court entered an Order allowing the City to remove the waterline on the condition that it restore the land to a good and proper condition (*i.e.*, it was allowed to trespass again). The Court of Appeals stated: "The relief was both fair and appropriate. We believe that the Court's Order in this regard was reasonable." Governale, 229 NW2d at 922. Obviously, the Trial Court's hands cannot be irrevocably tied from providing relief when a party has done something wrong. Otherwise the City of Owosso would have lost. In this case the remedy fashioned by the Trial Court is also fair and appropriate under the circumstances of this case and should be allowed to stand.

The Trial Court was justified in considering that not only did Mrs. Stokes solicit Millen to work in Michigan when he was unlicensed but also that she made false representations as to licensing to induce Millen to come. Afterward, she and her agents put considerable threat and force to bear threatening legal action on a contract she now claims is not enforceable. She did all of this after using the RBA once already as a sword.

CONCLUSION AND RELIEF REQUESTED

The Stokes came to the Trial Court with uncleaned hands seeking equitable relief. Once the Trial Court granted equitable relief to the Stokes, it was compelled to give Millen Roofing equitable relief as well. That equitable relief should have been awarded contemporaneously with its granting any relief to the Stokes. The Republic Bank decision was decided appropriately.

By its clear language, the Residential Builders Act does not apply to Millen Roofing. Article 24 does not require a license. Even if it would normally apply, it does not in this instance because Mrs. Stokes acted as contractor and the project she is involved with is excepted from the scope of the statute. Additionally, Millen is permitted to sue as a supplier, for which no license is required.

The Trial Court correctly found that Millen's remaining counts did not seek compensation and were therefore not excluded by the RBA.

Appellee requests that this Court affirm the Decision of the Court of Appeals and the Trial Court granting equitable relief to Millen Roofing. Millen Roofing also requests that this Court reverse the Court of Appeals and the Trial Court on that portion of the lower Courts' Decision which dismissed Defendant's Counter-Complaint for damages and other legal relief. Millen Roofing's Construction Lien should be restored.

Respectfully Submitted,

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